83-2148

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ALEXANDER L. STEVAS,
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No. 83-_____

In the Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF OREGON, DEPARTMENT OF FISH AND WILDLIFE, et al.,

Petitioners,

v.

KLAMATH INDIAN TRIBE,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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49 pp

QUESTION PRESENTED

May a state regulate hunting, fishing and trapping on former Indian reservation lands ceded by an Indian tribe to the federal government under the following circumstances:

(1) a treaty had reserved to the Tribe the right to hunt, fish and trap exclusive of state regulation as to lands "included in the reservation;"

(2) the cession agreement provided as to the ceded lands that the tribal members "do hereby cede, surrender, grant and convey to the United States all their claim, right, title and interest in and to" the ceded lands; and

(3) neither the cession agreement nor the circumstance surrounding its execution clearly indicated that Congress intended to restore to the tribal members their exclusive right to hunt, fish and trap on the ceded lands?

PARTIES

The parties to the proceeding in the Ninth Circuit Court of Appeals whose judgment is sought to be reviewed are as follows: Klamath Indian Tribe (respondent herein); The Oregon Department of Fish and Wildlife; John Donaldson, individually and as Director of Oregon Department of Fish and Wildlife; The Oregon Fish and Wildlife Commission; Don Barth, John Boyer, Kenneth Klarquist, R. Gene Morris, Herbert Lundy, Fred A. Phillips, II, Jack Steiwer, each individually and as a member of the Oregon Fish and Wildlife Commission; John C. Williams, individually and as Superintendent of the Oregon State Police; Major Sterling Norton, individually and as Head of Fish and Game Division of the Oregon State Police, (petitioners herein).

TABLE OF CONTENTS

Page

Question Presented i

Parties ii

Petition for Writ of Certiorari 1

Opinions Below 1

Jurisdiction 1

Statutes and Treaties Involved 1

Statement of the Case 2

Reasons for Allowance of Writ 8

A. In concluding that the Klamath Tribe retained hunting, fishing and trapping rights on the ceded land, the Ninth Circuit failed to appreciate or assess the legal significance of the fact that the Cession Agreement ratified by Congress in 1906 diminished the boundaries of the Klamath Indian Reservation. 9

B. The Ninth Circuit's decision squarely conflicts with the decision of the Eighth Circuit in *Red Lake Band v. State of Minnesota, supra*, in which the court of appeals correctly held that two cession agreements which diminished reservation boundaries abrogated treaty reserved rights to hunt, fish and trap exclusive of state 12

Conclusion 14

Appendix A App-1

Appendix B App-10

Appendix C App-17

Appendix D App-24

TABLE OF AUTHORITIES

Page

Cases Cited

DeCoteau v. District County Court, 420 U.S. 425 (1975) . . 9,10,11,13

Kimball v. Callahan, 493 F.2d 564 (9th Cir. 1974) 9

Klamath Indian Tribe v. The Oregon Department of Fish and Wild life, ___ F.Supp. ___ (D. Or. (1982) 1

Klamath Indian Tribe v. The Oregon Department of Fish and Wildlife, 729 F.2d 609 (9th Cir. 1984) 1,7,8,11

Menominee Tribe v. United States, 391 U.S. 404 (1968) 9,11

Red Lake Band of Chippewa Indians v. State of Minnesota, 614 F.2d 1161 (1980), *cert. den.*, 449 U.S. 905 (1980) 10,12,13,14

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) 10,11,13

Seymour v. Superintendent, 368 U.S. 351 (1962) 11

Solem v. Bartlett, ___ U.S. ___ , 104 S.Ct. 1161 (1984) 11

United States v. State of Minnesota, 466 F. Supp. 1382 (U.S. Dist. Ct., Minn., 1979), *aff'd sub nom, Red Lake Band v. State of Minnesota,* 13

Statutory Provisions

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 7

28 U.S.C. § 1331 6

28 U.S.C. § 2101(c) 1

Act of June 21, 1906, 34 Stat. 366 ..... passim

Treaty of October 14, 1864, 16 Stat. 707 (1866) ..... passim

PETITION FOR WRIT OF CERTIORARI

Petitioners Oregon Department of Fish and Wildlife, et al. (hereinafter "the state") respectfully pray that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in *Klamath Indian Tribe v. The Oregon Department of Fish and Wildlife, et al.*, No. 83-360 (March 27, 1984).

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported as *Klamath Indian Tribe v. The Oregon Department of Fish and Wildlife*, 729 F.2d 609 (9th Cir. 1984), and is attached to this petition as Appendix A. The opinion of the district court is unreported, and is attached as Appendix B.

JURISDICTION

The opinion of the Ninth Circuit Court of Appeals was dated and filed on March 27, 1984. The judgment sought to be reviewed was entered on the same date. Jurisdiction to review the Court of Appeals' judgment in this civil case by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254(1). This petition for writ of certiorari is filed within the 90-day period prescribed by 28 U.S.C. § 2101(c), as computed in accordance with Rule 20 and Rule 29(1) of the Rules of the Supreme Court of the United States.

STATUTES AND TREATIES INVOLVED

This case involves two acts of Congress. The first is the Treaty of October 14, 1864, 16 Stat. 707 (1866), in which the Klamath and Modoc Tribes, along with the Yahooskin Band of Snake Indians, ceded to the United States approximately 20

million acres of aboriginal lands and received in exchange a reservation comprising approximately 1.9 million acres. This treaty is set forth in full in Appendix C to this petition. The second is the Act of June 21, 1906, 34 Stat. 366, in which Congress ratified a cession agreement with the Klamath Indians providing for the Tribe's cession of 621,824 acres to the United States in exchange for $533,270. This Act is set forth in full in Appendix D to this petition.

STATEMENT OF THE CASE

By the Treaty of October 4, 1864, the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians ceded "all their right, title and claim" in approxin.ately 20 million acres of aboriginal lands in exchange for a reservation of approximately 1.9 million acres. This land "until otherwise directed by the President of the United States," was to "be set apart as a residence for said Indians, [and] held and regarded as an Indian reservation." (Stipulation of the Parties filed in the district court, hereinafter referred as "Stip.", Exhibit A). Pursuant to the terms of the treaty, the Klamath Tribe members agreed and bound

> "themselves that, immediately after the ratification of this treaty, they will remove to said reservation and remain thereon, unless temporary leave of absence be granted to them by the superintendent or agent having charge of the tribes."

Id.

The treaty further provided that the Indians would have the exclusive right to occupy the reservation and that no white persons were to remain on the reservation:

> "It is further stipulated and agreed that no white person shall be permitted to locate or remain upon the reservation, except the Indian superintendent and agent, employes of the Indian department, and officers of the Army of the United States, and that in case persons other than those specified are found upon the reservation, they shall be immediately expelled therefrom; *and the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits, is hereby secured to the Indians aforesaid . . . .*"

Id. (emphasis added).

In 1871, the United States government surveyed the reservation's exterior boundaries. (Stip., ¶ 2). The survey erroneously excluded a larger amount of land from the reservation boundaries because the natural boundaries referred to in the 1864 Treaty were not followed where they did not conform to township subdivision surveys. *Id.* In the years following 1871, tribal members complained because they believed land had been erroneously excluded from the reservation. (Stip., ¶ 3). Congress responded to the tribal complaints in 1896 by authorizing the appointment of the Klamath Boundary Commission to determine the number of acres excluded from the reservation and the value thereof. (Stip., ¶ 4). The commission interviewed tribal members who had been signatories to the 1864 Treaty. Many of these members testified they were convinced the excluded land was intended to be within the reservation boundaries because they had informed the Indian agent who negotiated the treaty that they wanted the land because of its hunting, fishing and gathering value. (Stip., Ex. D). The commission's report was transmit-

ted to the 54th Congress by the Secretary of the Interior, who noted in his transmittal letter

> "the Commissioners find the area of lands which have been excluded from the reservation by the erroneous surveys of its outboundaries to be 617,490 acres, and determine the value of these excluded lands to be $533,270.
>
> "The report in question has been carefully examined by the Commissioner of Indian Affairs, as shown by the accompanying communication dated 25th instant, who states that in his opinion a portion of the funds due the Indians should be made available for irrigation purposes for the benefit of the Indian allottees and the schools, . . . and the remainder of the sum recommended by the Commission to be paid . . . be expended under the direction of the Secretary of the Interior in the drainage and irrigation of lands, and in the purchase of cattle, wagons, mowing machines, and agricultural implements, the erection of houses, and for such other purposes as he may deem for the benefit of the Indians.
>
> "The Commissioner submits an item for insertion in the Indian appropriation bill now pending, prepared in accordance with the above recommendations, and I have the honor to recommend that the matter receive early and favorable consideration by the Congress."

(Stip., Ex. D). The Boundary Commission Report mentioned that the character of the excluded area varied greatly, and that

> "[w]ith the exception of the meadows of the Sycan and Sprague River sections, which are the principal bone of contention, the greater part of the excluded land consists of rocky and sterile mountain ranges, producing very ordinary timber and little grass.
>
> ". . . .

> "Giving these inferior tracts, the good timber land and the meadows of the Sycan and Sprague River valleys their proportionate valuation, we determine the value of the excluded land to be $533,270, or 617,490 acres at 86.36 cents per acre."

Id. After lengthy negotiations with the Klamath Indians, and subsequent surveys which revealed that 621,824 acres had been erroneously excluded, the United States entered into a cession agreement with the Klamath Indians on June 17, 1901, with respect to the erroneously excluded lands. (Stip., ¶¶ 7-11). This agreement was ratified by Congress in 1906. (Stip., ¶ 13).

Article I of the Act of 1906 provided that the Klamath Indians

> "*do hereby cede, surrender, grant and convey to the United States all their claim, right, title, and interest in and to all that part of the Klamath Indian Reservation* lying between the boundaries described in the [1864] treaty . . . and the reservation boundary lines as established by the survey approved in eighteen hundred and eighty-eight by the General Land Office, the tract of land hereby ceded and relinquished comprising six hundred and twenty-one thousand eight hundred and twenty-four acres."

(Stip., Ex. B, emphasis added).

Article II provided for the payment to the Klamath Indians of $537,007.20:

> "In consideration of the land ceded, relinquished, and conveyed by Article I of this agreement, and in full [sic] of all claims and demands of said Klamath and other Indians arising or growing out of the erroneous survey of the outboundaries of their reservation in eighteen hundred and seventy-one . . . ."

Id.

Article III specified the manner of payment to the Indians of the $537,007.20. Article IV provided:

> "It is understood that nothing in this agreement shall be construed to deprive the said Klamath and other Indians of the Klamath Agency of any benefits to which they are entitled under existing treaties, not inconsistent with the provisions of this agreement."

Id.

Virtually all of the land ceded by the Klamath Tribe was closed to entry and placed in either national forests or parks. (Stip., ¶ 14).

Since passage of the Act of 1906, tribal members have continued to hunt, fish and trap on the excluded lands without regard for state laws or regulations. (Stip., ¶ 20). The parties below agreed that although the State of Oregon generally asserted its jurisdiction over tribal members when they were hunting, fishing and trapping outside the reservation boundaries, the parties were unaware of any assertion by the state or denial by the Tribe of state jurisdiction over Indian hunting and fishing specifically with regard to the lands ceded in the 1906 Act. (Stip., ¶¶ 21-22).

On March 16, 1982 plaintiff Klamath Indian Tribe filed an action in the District Court for the District of Oregon pursuant to 28 U.S.C. § 1331, seeking to enjoin defendant Oregon state agencies from interfering with tribal members' hunting, fishing and trapping of wildlife on certain lands, and for declaration of their rights with respect thereto. At issue, specifically, was the State of Oregon's authority to extend its fish and game laws to two areas of land: (1) lands outside the exterior boundaries of the Klamath Indian reservation as

those boundaries existed at the time of termination of the Tribe in 1954, which lands had been ceded by the Tribe in 1906 to the United States (the ceded lands); and (2) lands within the boundaries of the reservation at the time of the 1954 termination, refered to as "C & O lands." The defendants conceded they had no authority to exert jurisdiction over the C & O lands.

On cross-motions for summary judgment, the district court granted judgment in favor of plaintiff Tribe and, declared that the Act of June 21, 1906, 34 Stat. 366, did not abrogate the treaty rights of the Klamath Indian Tribe to hunt, fish, and trap free from state regulation on lands ceded to the federal government under the 1906 Act. The State of Oregon appealed the district court's judgment to the Ninth Circuit Court of Appeals, pursuant to 28 U.S.C. § 1291.

The Ninth Circuit affirmed the judgment of the district court. The court of appeals reasoned:

(1) The ceded lands were originally intended to be included in the Treaty of 1864 but were excluded by an erroneous survey that did not diminish the reservation's boundaries.

(2) The treaty rights to hunt, fish and trap were "not appurtenant to the Tribe's property interest in the former reservation land itself" but existed "apart from ownership of the land." 729 F.2d at 612.

(3) Under a provision of the 1906 Act securing to the Indians "all benefits under existing treaties not inconsistent with the Act," the treaty-reserved rights to hunt, fish and trap

survived because they were not inconsistent with the 1906 Act.

(4) Because the treaty-reserved rights to hunt, fish and trap were not inconsistent with the cession agreement, "the Tribe's treaty rights may be abrogated only by a showing of clear congressional intent." 729 F.2d at 612.

(5) The face of the 1906 Act, the surrounding circumstances and legislative history show no clear congressional intent to abrogate the treaty reserved rights to hunt, fish and trap on lands included in the reservation.

With respect to this latter point the Ninth Circuit emphasized that the 1906 Act nowhere mentioned hunting, fishing and trapping rights. The court also stressed the fact that the Indians were not compensated for loss of hunting, fishing and trapping rights in the Cession Agreement as being indicative of congressional intent not to abrogate those rights.

REASONS FOR ALLOWANCE OF WRIT

The Ninth Circuit employed fallacious reasoning to reach the erroneous conclusion that the State of Oregon lacks the authority to regulate hunting, fishing and trapping on former Indian reservation lands which were removed from the reservation by a cession agreement voluntarily executed by the Klamath Indians and the United States. The Ninth Circuit ignored a fundamental principle of Indian treaty law that a diminishment of reservation boundaries necessarily entails a diminishment of Indian hunting, fishing and trapping rights, unless Congress affirmatively manifests its intent to grant these rights on the diminished land back to the Indians. The lower court's disregard of this fundamental principle is contrary to the rationale, if not the rule, of decisions of this Court in the area of Indian treaty law. Moreover, the issue presented has significance beyond this particular case, because the Ninth Circuit's erroneous resolution of the issue conflicts with the Eighth Circuit's resolution of the same issue.

A. In concluding that the Klamath Tribe retained hunting, fishing and trapping rights on the ceded land, the Ninth Circuit failed to appreciate or assess the legal significance of the fact that the Cession Agreement ratified by Congress in 1906 diminished the boundaries of the Klamath Indian Reservation.

The state argued below that under a prior decision of the Ninth Circuit[1] the Indians' right to hunt, fish, trap and gather on lands within the reservation, exclusive of state regulation was premised on the Indians' right of occupancy of the lands and the language of the 1864 Treaty granting the Indians "the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds and berries within its limits." Citing this Court's opinion in *DeCoteau v. District County Court*, 420 U.S. 425 (1975), the state further argued that the terms of the 1906 Act, "do hereby cede, surrender, grant, and convey to the United States

[1] In *Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974), the Ninth Circuit, relying upon *Menominee Tribe v. United States*, 391 U.S. 404 (1968), held that the 1864 Treaty with the Klamath Tribe contained a reservation of hunting, fishing and trapping rights which were not abrogated by the 1954 Klamath Termination Act as to lands within the boundaries of the reservation at the time of termination of federal supervision over the Tribe.

all their claim, right, title, and interest in and to" the ceded land, had the clear effect of diminishing the boundaries of the reservation as established in the 1864 Treaty by deleting the ceded land from the reservation boundaries. The state then made the basic point that the 1906 Act necessarily had the effect of abrogating the Indians' treaty reserved rights in the ceded land. This point necessarily follows because the land had been removed from the boundaries of the reservation, and because the Indians' only entitlement to hunt, fish, trap and gather on the lands free of state regulation was based on inclusion of the land within the boundaries of the reservation. The Ninth Circuit either missed or ignored this point.

In its written opinion the Ninth Circuit did not even mention the fact that the 1906 Act diminished the reservation's boundaries, even though the Klamath Tribe conceded this fact in its brief below. The lower court evidently bypassed the state's argument, based on *DeCoteau v. District County Court*, *supra*; *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), and the Eighth Circuit's decision in *Red Lake Band of Chippewa Indians v. State of Minnesota*, 614 F.2d 1161 (1980), *cert. den.*, 449 U.S. 905 (8th Cir. 1980), that as a result of the diminishment of reservation boundaries tribal members lost their rights to hunt, fish, trap and gather exclusive of state regulation on the lands removed from the reservation boundaries, absent congressional action to restore those rights. The Ninth Circuit discussed neither these cases nor the impact of

diminishment of reservation boundaries on the outcome of this case.[2]

All the decisions of this Court, from *Seymour v. Superintendent*, 368 U.S. 351 (1962), through the recent decision in *Solem v. Bartlett*, ___ U.S. ___, 104 S.Ct. 1161 (1984), have commenced with resolution of the fundamental question: Did Congress intend to disestablish or diminish reservation boundaries in passing the act giving rise to the controversy in the case? When this Court has found that disestablishment or diminishment has occurred, state regulation of the area disestablished or removed from the reservation, when at issue, has been upheld.[3] *DeCoteau v. District County Court*. Moreover, where this Court has not upheld state regulation of the area in question, it has reached this conclusion because the area had not been removed from the reservation boundaries. *See Seymour v. Superintendent*, *supra*; *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Mattz v. Arnett*, 412 U.S. 481 (1973); *Solem v. Bartlett*, *supra*.

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[2] The Ninth Circuit did cite *Rosebud Sioux Tribe v. Kneip*, *supra*, as authority for the proposition that the court was "obliged to examine the face of the 1906 Act, the surrounding circumstances, and the legislative history" for any indication of clear congressional intent to abrogate the Tribe's treaty rights, inasmuch as the right to hunt, fish and trap on the ceded lands was not, in the court's view, inconsistent with the cession agreement. 729 F.2d at 612.

[3] In *Rosebud Sioux Tribe v. Kneip*, *supra*, this Court found that certain congressional acts clearly evidenced congressional intent to diminish the boundaries of the Rosebud Sioux Reservation, notwithstanding language in all of the acts providing that "nothing in this 'agreement shall be construed to deprive the . . . Indians of the Rosebud Reservation, South Dakota, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement." 430 U.S. at 623 (Justice Marshall, dissenting). This language is identical to language in the 1906 Act upon which the court below relied in concluding the treaty reserved rights in the ceded land survived the cession agreement.

Thus, the Ninth Circuit committed a fundamental error when it failed to address the impact of diminishment of the reservation's boundaries by the Act of 1906, the fact of which was not even in dispute between the parties. Because of this error, the Ninth Circuit reached an improper conclusion and wrongly deprived the state of the authority to regulate hunting, fishing and trapping on 621,000 acres of prime wilderness area.

B. The Ninth Circuit's decision squarely conflicts with the decision of the Eighth Circuit in *Red Lake Band of Chippewa Indians v. State of Minnesota*, *supra*, in which the court of appeals correctly held that two cession agreements which diminished reservation boundaries abrogated treaty reserved rights to hunt, fish and trap exclusive of state regulation on the ceded lands.

The Ninth Circuit erroneously declined to follow the decision of the Eighth Circuit in *Red Lake Band of Chippewa Indians v. State of Minnesota*, *supra*, a case virtually on all fours with the present matter. In *Red Lake Band*, the Eighth Circuit affirmed the district court's "well reasoned decision" (614 F.2d 1162) that the Band gave up its rights to hunt, fish, trap and gather wild rice free of the state's regulation of such activities, on lands which it agreed to cede to the federal government in 1889 and 1904. The district court held that by the terms of two cession agreements, which provided that the Band "agreed to 'grant, cede, relinquish, and convey to the United States all our right, title, and interest in and to' " the

ceded land, the Band had relinquished all rights to hunt, fish and trap on the ceded land. *United States v. State of Minnesota*, 466 F. Supp. 1382 (U.S. Dist. Ct., Minn., 1979), *aff'd sub nom*, *Red Lake Band of Chippewa Indians v. State of Minnesota*, *supra*. The district court aptly had noted that the language used in the cession agreements was "nearly identical" to that contained in *Rosebud Sioux Tribe v. Kneip*, *supra*, and *DeCoteau v. District County Court*, *supra*, wherein this Court made "clear that the . . . language is 'precisely suited' for the purpose of eliminating Indian title and conveying to the government all the Band's interest in the ceded lands," including the Band's rights to hunt, fish, and trap. *United States v. State of Minnesota*, 466 F. Supp. at 1385.

The district court opinion adopted by the Eighth Circuit in *Red Lake Band* did not end its analysis with its determination that the language, "grant, cede, relinquish, and convey . . . all our right, title, and interest in and to" the ceded land, resulted in the Band's relinquishment of its hunting, fishing and trapping rights in the ceded land. The court further analyzed the cession agreements and the circumstances surrounding their execution to determine whether Congress had granted *back* to the Band hunting, fishing and trapping rights in exchange for the ceded land. The court found no congressional intent to grant back to the Band hunting, fishing and trapping rights on the ceded land, and correctly concluded that abrogation of those rights had resulted from the cession acts in question.

The Ninth Circuit not only declined to follow the analysis of the Eighth Circuit in *Red Lake Band*, it failed to discuss or

distinguish the prior federal decision in its opinion or to indicate why it may have concluded that the decision was wrong. The Ninth Circuit's opinion in the present case is squarely in conflict with the Eighth Circuit's decision in *Red Lake Band of Chippewa Indians v. State of Minnesota, supra*, and this Court should grant certiorari to resolve the conflict between the circuits.

CONCLUSION

At issue in the present case is the state's power to regulate hunting, fishing and trapping on approximately 621,000 acres, or 970 square miles of former reservation land. The Ninth Circuit's decision incorrectly deprives the state of regulatory authority over this large tract. The decision is fundamentally flawed and in conflict with a prior decision of another circuit. For these reasons, this Court should grant the petition for certiorari to review the significant issue presented and reverse the judgment of the court below.

Respectfully submitted,
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APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

KLAMATH INDIAN TRIBE,	)	
	)	
Plaintiff-Appellee,	)	NO. 83-3660
	)	
v.	)	DC NO. 82-367-SO
	)	
THE OREGON DEPARTMENT OF FISH AND WILDLIFE, et al.,	)	OPINION
	)	
Defendants-Appellants.	)	

Appeal from the United States District Court
District of Oregon
Gus J. Solomon, District Judge Presiding
Argued and Submitted: January 6, 1984

Before: KILKENNY, WALLACE and CANBY, Circuit Judges.

KILKENNY, Circuit Judge:

Appellant Oregon Department of Fish and Wildlife appeals from part of the district court's grant of summary judgment in favor of the Klamath Indian Tribe. The court held, in part, that the Tribe, and not the state, has the right to regulate tribal members' hunting, fishing and trapping on lands ceded to the United States in 1901. We affirm.

FACTS

In 1864, the Klamath and Modoc Tribes, along with the Yahooskin Band of Snake Indians, ceded to the United States roughly 20 million acres of aboriginal lands. In return, they

received a 1.9 million acre reservation. Treaty of October 4, 1864, 16 Stat. 707 (1866). A portion of the treaty provided:

> [T]he following described tract . . . shall, . . . be set apart as a residence for said Indians, [and] held and regarded as an Indian reservation. . . . [T]he exclusive right of taking fish in the streams and lakes, included in said reservation, . . . is hereby secured to the Indians . . . .

Government surveyors twice surveyed the reservation boundaries, once in 1871 and again in 1888. Both surveys failed to include large tracts of land concededly intended for the reservation. Following years of tribal complaints, Congress authorized a commission to determine the amount and value of the excluded land. In 1896 the commission concluded that 617,000 acres were erroneously excluded, and that the land was worth $553,270, or 86.36 cents per acre. This figure was based on soil quality, grazing lands, timber, and the quantity of rock formation. Tribal members' hunting, fishing and trapping rights were not mentioned.

In 1901 the Bureau of Indian Affairs negotiated an agreement withe [*sic*] the Tribe for cession of the excluded lands at the rate of 86.36 cents per acre. The agreement relied on a survey accepted by the General Land Office that show 621,824 acres excluded. The agreement provided in part:

> [N]othing in this agreement shall be construed to deprive the [Tribe] of any benefits to which they are entitled under existing treaties, not inconsistent with the provisions of this agreement.

Congress ratified the agreement in 1906. Act of June 21, 1906, 34 Stat. 366. Virtually all ceded lands were immediately closed to entry and placed in national forests or parks.

In 1969 the Indian Claims Commission awarded the Tribe over four million dollars for the ceded lands because of the inconscionable consideration originally paid the Tribe. The ICC did not mention tribal members' hunting, fishing and trapping rights in its calculations. *Klamath & Modoc Tribes v. United States*, 20 Ind. Cl. Comm. 522, 525-26 (1969).

The parties agree that the state has no authority to regulate Indian hunting, fishing and trapping on reservation lands. They also agree that these activities were essential to the Tribe's survival when the 1864 Treaty was executed and remain a significant part of the tribal lifestyle today. Tribal members have continued to hunt, fish and trap on the ceded lands from 1906 to the present, without regard for state laws and regulations.

This court has held that under the same treaty, tribal members who elected to withdraw from the Tribe pursuant to the Klamath Termination Act of 1954 nevertheless retained treaty rights to hunt, fish and trap on former reservation lands. *Kimball v. Callahan*, 493 F.2d 564 (CA9), *cert. denied*, 419 U.S. 1019 (1974) (*Kimball I*); *Kimball v. Callahan*, 590 F.2d 768 (CA9), *cert. denied*, 444 U.S. 826 (1979) (*Kimball II*). The lands in *Kimball I* and *II* constituted national forest land and that private land on which hunting, trapping or fishing was permitted. 493 F.2d at 569-70.

The Tribe filed this action to enjoin Oregon state agencies and officials from interfering with tribal members who hunt, fish or trap on the ceded lands.

ISSUE

Whether the Klamath tribal members retained hunting, fishing and trapping rights on lands ceded to the United States in 1901, so that they may exercise those rights free of state regulation.

STANDARD OF REVIEW

No genuine issues of material fact are present. Accordingly, this court must determine whether the district court's decision was erroneous as a matter of law. *California ex rel. Younger v. Tahoe Reg. Planning Agency*, 516 F.2d 215, 217 (CA9), *cert. denied*, 423 U.S. 868 (1975).

DISCUSSION

A treaty is a grant of rights from the Indians to the grantee. It is not, as suggested by appellant, a grant of rights to the Indians. All rights not granted are reserved to the Indians and these rights are to every individual Indian as though named in the instrument of transfer. *United States v. Winans*, 198 U.S. 371, 381 (1905). The reserved rights impose a servitude on every piece of land as though specifically described therein. *Winans, Id.* A tribe retains all rights not expressly ceded in the treaty so long as the rights are consistent with the tribe's sovereign status. *United States v. Adair*, 723 F.2d 1394, 1413 (CA9 1983).

Indian treaties should be construed as the tribes would have understood them, *Choctaw Nation v. Oklahoma*, 397 U.S.

620, 631 (1970), and they are broadly interpreted in the Indian's favor. *Washington v. Fishing Vessel Ass'n*, 443 U.S. at 676.

Here, the Tribe seeks the right to regulate its tribal members' hunting, fishing and trapping activities, free of state interference. It does not claim that its members may conduct those activities on private land, absent consent of the landowner. *See Antione v. Washington*, 420 U.S. 194, 207 n.11 (1975). Simply stated, we must first determine whether the 1864 Treaty reserved for the Tribe the right to hunt, fish and trap on the ceded lands.

The Tribe relies on this court's decisions in *Kimball I*, and *II*. The court in *Kimball I* held that tribal members who withdrew from the tribe pursuant to the Klamath Termination Act still retained the right to hunt, fish and trap on former reservation lands. *Kimball I* relied on *Menominee Tribe v. United States*, 391 U.S. 404 (1968), where the Court held that treaty language included the right to hunt and fish, *even though the treaty made no mention of hunting and fishing rights*. The court in *Kimball I* noted that the Tribe enjoyed the exclusive rights to those activities for nearly 100 years with the consent and acquiesence [*sic*] of the state; that courts have a duty to construe treaties favorably to Indians; and that it was unlikely that the Tribe would have knowingly relinquished hunting and fishing rights when they entered into the treaty. *Kimball I*, 493 F.2d at 566.

The state argues initially that *Kimball I* and *Menominee* are distinguishable. The essence of its argument is twofold —

one, because the ceded lands were never a part of the reservation the treaty does not apply to them and two, hunting, fishing and trapping rights are appurtenant to occupancy rights, and therefore when the Tribe ceded its property rights it also gave up its right to hunt, fish and trap on the ceded lands.

Neither argument is sound. First, the Tribe and the government understood the treaty to include the land erroneously excluded. Survey errors cannot diminish a reservation's boundaries. *Sekaquaptewa v. MacDonald*, 626 F.2d 113, 118 (CA9 1980). The subsequent cession agreement itself served to compensate the Tribe for the land erroneously excluded, but made no mention of hunting, fishing and trapping rights.

Second, treaty rights to hunt and fish are not appurtenant to the Tribe's property interest in the former reservation land itself. The fact that such rights may continue to exist apart from ownership of the land was reaffirmed in *Kimball II*, 590 F.2d at 772-73. Other courts have also upheld retention of treaty rights to hunt and fish despite loss of possessory title. *See Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 823 (CA8 1983), *cert. denied*, 104 S.Ct. 707 (1984); *Lac Courte Oreilles Band v. Voigt*, 700 F.2d 341, 352 (CA7), *cert. denied*, 104 S.Ct. 53 (1983). *See also United States v. Adair*, 723 F.2d at 1412 (Klamath Termination Act did not abrogate tribal water rights as reserved in 1864 Treaty).

Article IV of the cession agreement states that the Tribe is entitled to all benefits under existing treaties not inconsistent

with the agreement. Treaty rights to hunt, fish and trap are not inconsistent with the agreement. The agreement provided for payment to the Tribe at a rate of 83.36 cents per acre, however neither the Boundary Commission Report nor the cession agreement mentioned compensation for the Indian's hunting, fishing and trapping rights. These rights are valuable property rights, and abrogation by Congress gives rise to a claim for compensation under the fifth amendment. COHEN, HANDBOOK OF INDIAN LAW, at 468 (1982). *See Menominee Tribe*, 391 U.S. at 413. *See also Shoshone Tribe v. United States*, 299 U.S. 476 (1937); *Whitefoot v. United States*, 293 F.2d 658, 659 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962); 13 Stat. 324 (1864). ($5,000 paid for off-reservation hunting and fishing rights). The United States converted substantially all of the ceded lands into national forests or parks immediately following execution of the cession agreement. Clearly, use of those lands as forests or parks is not diminished by exercise of the right to hunt, fish and trap on those lands. *See Lower Brule*, 711 F.2d at 817-18.

Having decided that the right to hunt, fish and trap on the ceded lands is not inconsistent with the cession agreement, the Tribe's treaty rights may be abrogated only by a showing of clear congressional intent. In this context, we are obliged to examine the face of the 1906 Act, the surrounding circumstances, and the legislative history. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977). The State argues that examination of these factors shows clear congressional intent to abrogate treaty rights. We cannot agree.

Again, we reemphasize that nowhere in the 1906 Act are hunting, fishing and trapping rights mentioned. The state asserts that retention of treaty rights is contrary to the Tribe's agrarian progress and the dominent purpose of the Act, to convert the Indians into an agricultural people. The purpose of the Act, as shown by the pre-treaty negotiations and the congressional history, was to settle a boundary dispute while continuing to honor the Tribe's treaty rights. In fact, only a small part of the ceded lands was usable for agricultural purposes, and was far better suited for hunting, fishing and trapping.

The United States acts in one of two capacities when dealing with the Indians, either as trustee or as sovereign, in exercise of its powers of eminent domain, *United States v. Sioux Nation*, 448 U.S. 371, 408-09 (1980). Federal executive officials must exercise due care in administration of Indian property; they cannot as a result of a negligent survey give tribal lands or rights to others or appropriate them to their own purposes. *See United States v. Creek Nation*, 295 U.S. 103, 109-10; COHEN, at 226, 486. In this case, the United States acted as trustee in executing the cession agreement. *See C & O Land Co. v. Rankin*, 87 Fed. 532, 533 (D. Or. 1898). An interpretation of the Act as abrogating hunting and fishing rights would be wholly inconsistent with the government's trustee status. The failure to compensate the Tribe for those rights further evidences a lack of congressional intent to abrogate the Tribe's rights.

Finally, the legislative history demonstrates that the Interior Department and the Tribe understood that the treaty rights extended to the land described in the treaty, including the land erroneously excluded. The Tribe insisted upon inclusion of those lands when the treaty was signed, and complained for years until a boundary commission was established to correct the boundary errors.

Congress has the ability to directly express its intent regarding imposition of state law. *See Bryan v. Itasca County*, 426 U.S. 373, 389 & n.15 (1976). The state has not shown the clear congressional intent required to abrogate the Tribe's treaty rights. *See Kimball I*, 493 F.2d at 569.

In sum, the Tribe and its members retained their treaty rights to hunt, fish and trap on the ceded lands. It follows that those rights may be exercised free of usual state regulation. *See Kimball I*, 493 F.2d at 566.

CONCLUSION

The judgment of the district court is hereby AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

KLAMATH INDIAN TRIBE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 82-367-SO
	)	
THE OREGON DEPARTMENT OF FISH AND WILDLIFE; et al.,	)	OPINION
	)	
	)	
Defendants.	)	
	)	

[Names of counsel omitted in printing]

SOLOMON, Judge:

The Klamath Indian Tribe (Tribe) filed this action to enjoin Oregon State agencies and officials from interfering with Tribe members who hunt, fish, or trap wildlife within the boundaries of their reservation. Both parties have moved for summary judgment.

The facts are undisputed. In 1864, the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians by treaty ceded about twenty million acres of land in exchange for a reservation comprising 1.9 million acres. Treaty with the Klamath, etc., Oct. 4, 1864, 16 Stat. 707 (1866). The tribes agreed to "cede to the United States all their right, title, and claim to all the country" outside certain boundaries defined by geographical landmarks. The treaty guaranteed the Tribes

"the exclusive right of taking fish in the streams and lakes, included in the reservation."

In 1871 government surveyor Mercer surveyed the reservation boundaries; he erroneously excluded much land from the reservation. In 1888 surveyor William Thiel resurveyed the reservation; he too excluded much land.

After years of tribal complaints about white settlers on reservation land, the government authorized a commission to determine the amount of land erroneously excluded, and to determine its value. In 1896 the commission determined that 617,000 acres had been erroneously excluded,[1/] and that the land was worth 86.36 cents per acre, or $533,270. Klamath Boundary Commission Report, S. Rep. No. 93, 59th Cong., 2d Sess. (1897). This figure was based on soil quality, grazing land, timber, and the quantity of rock formations, but not the Tribe's hunting, fishing, and trapping rights.

The Bureau of Indian Affairs (BIA) negotiated an agreement with the Tribe for cession of the excluded lands for payment at a rate of 86.36 cents per acre. The agreement provided that the Tribe would "cede, surrender, grant and convey to the United States all their claim, right, title and interest in and to all that part of the Klamath Indian Reservation" that had been erroneously excluded by the earlier surveys. The agreement also provided that

> [N]othing in this agreement shall be construed to deprive the [Tribe] of any benefits to which they are

> entitled under existing treaties not inconsistent with the provisions of this agreement.

The agreement was ratified by Congress in 1906. Act of June 21, 1906, 34 Stat. 367.

Almost all of the ceded land was immediately closed to entry and placed in national forests or parks.

In 1969 the Indian Claims Commission (ICC) awarded the Tribe $4,152.992.80 as compensation for the inadequate consideration which the United States paid the Tribe for the land ceded under the 1906 agreement. In arriving at this figure, the ICC did not consider the value of the Tribe's hunting, fishing, and trapping rights. *Klamath and Modoc Tribes, etc. v. United States*, 20 Ind. Cl. Comm. 522, 540-43 (Docket No. 100-A, May 14, 1969).

Both parties agree that the State of Oregon has no authority to regulate Indian hunting, fishing, and trapping on reservation lands. The parties also agree that hunting, fishing, gathering, and trapping were essential to the Tribe's survival when the 1864 treaty was executed, and that these activities still constitute a significant part of the Tribal lifestyle. Members of the Tribe have continued to hunt, fish, and trap on the excluded lands from the 1906 cession to the present, without regard to state laws and regulations.

The Tribe contends that *Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974) permits the Tribe to hunt, fish, and trap free of state regulation. *Kimball* held that the act which terminated the Klamath Indian Reservation in 1954 did not affect the treaty rights of each Tribe member to hunt, fish, and trap on the lands which were part of the reservation. This action

involves the same parties as *Kimball*. However, the purpose of the Cession Act involved here is different from the Termination Act involved in *Kimball*. The Termination Act extinguished a relationship between the Tribe and the federal government, but the Cession Act removed lands from the Klamath Reservation.

Cession treaties and agreements must be interpreted as the Indians understood them, and doubtful expressions must be resolved in favor of the Indians. *Washington v. Washington Fishing Vessel Association*, 443 U.S. 658, 676 (1979); *United States v. Truckee-Carson Irrigation District*, 649 F.2d 1286, 1298 (9th Cir. 1981), *cert. granted*, ___ U.S. ___(1982). In *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943), the Supreme Court stated:

> [T]reaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties. Especially is this true in interpreting treaties with the Indians; they are to be construed, so far as possible, in the sense in which the Indians understood them, and "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." [citations omitted]

The Tribe contends that the Cession Act did not abrogate any hunting, fishing, or trapping rights because (1) the agreement expresses an intent to preserve, not limit, treaty rights, and (2) Congress did not clearly express an intent to limit treaty rights. The Tribe also contends that the wildlife was not considered in determining the compensation due it. The

Tribe argues that its loss of interests in tribal property does not entail a loss of treaty rights.

The Defendants contend that the ceded lands are no longer part of the reservation because the Cession Agreement diminished the reservation boundaries.

Defendants rely on *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). The Rosebud Sioux Indian Tribe ceded land to the Government for sale to settlers, with proceeds going to the Rosebud Tribe as they were received. The Court held that the acts which authorized the sale showed that Congress intended to diminish the boundaries of the reservation.

Defendants contend that *Rosebud* allows the state to exercise jurisdiction over all ceded lands, except those lands which remain within the reservation. In my view, the Defendants read *Rosebud* too broadly. The *Rosebud* Court relied heavily on the legislative history of the cession acts, which indicated that the Rosebud Indians used only a small section of the reservation. For many years the state exercised undisputed jurisdiction over the ceded lands. Here, in contrast, the parties agree that the Tribe members have continuously hunted, fished, and trapped on the excluded lands.

Defendants also contend that because the cession language in the 1864 treaty is similar to the language in the 1906 Cession Act, the two documents should be given the same effect; both abrogate hunting, fishing, and trapping rights over the ceded lands. This construction is much too narrow, and is contrary to the rule that treaties and agreements with the Indians must be construed as the Indians understood them, and in light of the peculiar history and circumstances which

surround the agreement. Furthermore, there is an important difference between the 1864 treaty and the 1906 Cession Act: the Cession Act provides that the agreement shall not deprive the Tribe of "benefits to which they are entitled under existing treaties not inconsistent with the provisions of this agreement."

Even if the 1906 Cession Act diminished the boundaries of the Reservation, the Tribe was not compensated for the hunting, fishing, and trapping rights on the excluded lands. Congress in the past has paid other tribes for destruction or impairment of similar rights, *see* 13 Stat. 324 (1864) ($5,000 compensation for off-reservation hunting and fishing rights); *Whitefoot v. United States*, 293 F.2d 658, 660 (9th Cir. 1961), *cert. denied* 369 U.S. 818 (1962) ($15 million for loss of fishing privileges caused by dam construction). Congress' failure to compensate the Tribe here for loss of hunting, fishing, and trapping rights indicates that Congress did not intend to extinguish those rights.

One purpose of the 1864 treaty was to provide a reservation that would enable the Tribe to remain self-sufficient. The government's use of the ceded reservation lands for wildlife refuge and national forest purposes are consistent with the

Tribe's claim to hunting, fishing, and trapping rights. *See United States v. Adair*, 478 F. Supp. 336, 345, 346 n.5 (D. Or. 1979). I hold that there was no clear Congressional intent to extinguish the Tribe's hunting, fishing, and trapping rights in the ceded land, and that these rights were not terminated.

The Tribe's motion for summary judgment is granted, and Defendants' motion for summary judgment is denied.

DATED this 30th day of December, 1982.

[Signature omitted in printing]

FOOTNOTE

1/ In 1900, the Bureau of Indian Affairs revised this estimate upward to 621,824 acres of land which were erroneously excluded.

APPENDIX C

TREATY WITH THE KLAMATH, ETC., 1864

Articles of agreement and convention made and concluded at Klamath Lake, Oregon, on the fourteenth day of October, A.D. one thousand eight-hundred and sixty-four, by J.W. Perit Huntington, superintendent of Indian affairs in Oregon, and William Logan, United States Indian agent for Oregon, on the part of the United States, and the chief and head-men of the Klamath and Moadoc tribes, and Yahooskin band of Snake Indians, hereinafter named, to wit, La-Lake, Chil-o-que-nas, Kellogue, Moghen-kas-kit, Blow, Le-lu, Palmer, Jack, Que-as, Poo-saksult, Che-mult, No-ak-sum, Mooch-kat-allick, Toon-tucktee, Boos-ki-you, Ski-a-tic, Shol-las-loos, Ta-tet-pas, Mukhas, Herman-koos-mam, chiefs and head-men of the Klamaths; Schon-chin, Stat-it-ut, Keint-poos, Chuck-e-i-ox, chiefs and head-men of the Moadocs, and Kile-to-ak and Sky-te-ock-et, chiefs of the Yahooskin band of Snakes.

ARTICLE 1. The tribes of Indians aforesaid cede to the United States all their right, title, and claim to all the country claimed by them, the same being determined by the following boundaries, to wit: Beginning at the point where the forty fourth parellel of north latitude crosses the summit of the Cascade Mountains; thence following the main dividing-ridge of said mountains in a southerly direction to the ridge which separates the waters of Pitt and McCloud Rivers from the waters on the north; thence along said dividing-ridge in an easterly direction

to the southern end of Goose Lake; thence northeasterly to the northern end of Harney Lake, thence due north to the forty-fourth parellel of north latitude; thence west to the place of beginning: *Provided*, That the following-described tract, within the country ceded by this treaty, shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians, [and] held and regarded as an Indian reservation, to wit: Beginning upon the eastern shore of the middle Klamath Lake, at the Point of Rocks, about twelve miles below the mouth of Williamson's River; thence following up said eastern shore to the mouth of Wood River; thence up Wood River to a point one mile north of the bridge at Fort Klamath; thence due east to the summit of the ridge which divides the upper and middle Klamath Lakes; thence along said ridge to a point due east of the north end of the upper lake; thence due east, passing the said north end of the upper lake, to the summit of the mountains on the east side of the lake; thence along said mountain to the point where Sprague's River is intersected by the Ish-tish-ea-wax Creek; thence in a southerly direction to the summit of the mountain, the extremity of which forms the Point of Rocks; thence along said mountain to the place of beginning. And the tribes aforesaid agree and bind themselves that, immediately after the ratification of this treaty, they will remove to said reservation and remain thereon, unless temporary

leave of absence be granted to them by the superintendent or agent having charge of the tribes.

It is further stipulated and agreed that no white person shall be permitted to locate or remain upon the reservation, except the Indian superintendent and agent, employes of the Indian department, and officers of the Army of the United States, and that in case persons other than those specified are found upon the reservation, they shall be immediately expelled therefrom; and the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits, is hereby secured to the Indians aforesaid: *Provided, also*, That the right of way for public roads and railroads across said reservation is reserved to citizens of the United States.

ARTICLE 2. In consideration of, and in payment for the country ceded by this treaty, the United States agree to pay to the tribes conveying the same the several sums of money thereinafter enumerated, to wit: Eight thousand dollars per annum for a period of five years, commencing on the first day of October, eighteen hundred and sixty-five, or as soon thereafter as this treaty may be ratified; five thousand dollars per annum for the term of five years next succeeding the first period of five years; and three thousand dollars per annum for the term of five years next succeeding the second period; all of which several sums shall be applied to the use and benefit of

said Indians by the superintendent or agent having charge of the tribes, under the direction of the President of the United States, who shall, from time to time, in his discretion, determine for what objects the same shall be expended, so as to carry out the design of the expenditure, [it] being to promote the well-being of the Indians, advance them in civilization, and especially agriculture, and to secure their moral improvement and education.

ARTICLE 3. The United States agree to pay said Indians the additional sum of thirty-five thousand dollars, a portion whereof shall be used to pay for such articles as may be advanced to them at the time of signing this treaty, and the remainder shall be applied to subsisting the Indians during the first year after their removal to the reservation, the purchase of teams, farming implements, tools, seeds, clothing, and provisions, and for the payment of the necessary employés.

ARTICLE 4. The United States further agree that there shall be erected at suitable points on the reservation, as soon as practicable after the ratification of this treaty, one saw-mill, one flouring mill, suitable buildings for the use of the blacksmith, carpenter, and wagon and plough maker, the necessary buildings for one manual-labor school, and such hospital buildings as may be necessary, which buildings shall be kept in repair at the expense of the United States for the term of twenty years; and it is further stipulated that the necessary tools and material for the saw-mill, flour-mill, carpenter,

blacksmith, and wagon and plough maker's shops, and books and stationery for the manual-labor school, shall be furnished by the United States for the period of twenty years.

ARTICLE 5. The United States further engage to furnish and pay for the services and subsistence, for the term of fifteen years, of one superintendent of farming operations, one farmer, one blacksmith, one sawyer, one carpenter, and one wagon and plough maker, and for the term of twenty years of one physician, one miller, and two schoolteachers.

ARTICLE 6. The United States may, in their discretion, cause a part or the whole of the reservation provided for in Article 1 to be surveyed into tracts and assigned to members of the tribes of Indians, parties to this treaty, or such of them as may appear likely to be benefited by the same, under the following restrictions and limitations, to wit: To each head of a family shall be assigned and granted a tract of not less than forty nor more than one hundred and twenty acres, according to the number of persons in such family; and to each single man above the age of twenty-one years a tract not exceeding forty acres. The Indians to whom these tracts are granted are guaranteed the perpetual possession and use of the tracts thus granted and of the improvements which may be placed thereon; but no Indian shall have the right to alienate or convey any such tract to any person whatsoever, and the same shall be forever exempt from levy,

sale, or forfeiture: *Provided*, That the Congress of the United States may hereafter abolish these restrictions and permit the sale of the lands so assigned, if the prosperity of the Indians will be advanced thereby: *And provided further*, If any Indian, to whom an assignment of land has been made, shall refuse to reside upon the tract so assigned for a period of two years, his right to the same shall be deemed forfeited.

ARTICLE 7. The President of the United States is empowered to declare such rules and regulations as will secure to the family, in case of the death of the head thereof, the use and possession of the tract assigned to him, with the improvements thereon.

ARTICLE 8. The annuities of the tribes mentioned in this treaty shall not be held liable or taken to pay the debts of individuals.

ARTICLE 9. The several tribes of Indians, parties to this treaty, acknowledge their dependence upon the Government of the United States, and agree to be friendly with all citizens thereof, and to commit no depredations upon the person or property of said citizens, and to refrain from carrying on any war upon other Indian tribes; and they further agree that they will not communicate with or assist any persons or nation hostile to the United States, and, further, that they will submit to and obey all laws and regulations which the United States may prescribe for their government and conduct.

ARTICLE 10. It is hereby provided that if any member of these tribes shall drink any spirituous liquor, or bring any such liquor upon the reservation, his or her proportion of the benefits of this treaty may be withheld for such time as the President of the United States may direct.

ARTICLE 11. It is agreed between the contracting parties that if the United States, at any future time, may desire to locate other tribes upon the reservation provided for in this treaty, no objection shall be made thereto; but the tribes, parties to this treaty, shall not, by such location of other tribes, forfeit any of their rights or privileges guaranteed to them by this treaty.

ARTICLE 12. This treaty shall bind the contracting parties whenever the same is ratified by the Senate and President of the United States.

In witness of which, the several parties named in the foregoing treaty have hereunto set their hands and seals at the place and date above written.

[Signatures omitted in printing]

APPENDIX D

ACT OF JUNE 21, 1906

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the purpose of paying the current and contingent expenses of the Indian Department, for fulfilling treaty stipulations with various tribes, and in full compensation for all offices the salaries for which are specially provided for herein for the service of the fiscal year ending June thirtieth, nineteen hundred and seven, namely:

. . . .

OREGON

For support and civilization of the Klamath, Modocs, and other Indians of the Klamath Agency, Oregon, including pay of employees, five thousand dollars.

For support and civilization of the conferated tribes and bands under Warm Springs Agency, and for pay of employees, four thousand dollars.

For support and civilization of the Walla Walla, Cayuse, and Umatilla tribes, Oregon, including pay of employees three thousand dollars.

Whereas James McLaughlin, an Indian inspector for and on behalf of the Secretary of the Interior, under and by virtue of an Act of Congress approved July first, eighteen hundred and ninety-eight (Thirtieth United

States Statute Laws, page five hundred and seventy-one), entitled "An Act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-nine, and for other purposes," did, on the seventeenth day of June, nineteen hundred and one, make and conclude an agreement with the Klamath and Modoc tribes and Yahooskin band of Snake Indians, residing on the Klamath Indian Reservation, in the State of Oregon, which agreement is as follows:

This agreement, made and entered into on the seventeenth day of June, nineteen hundred and one, by and between James McLaughlin, U.S. Indian inspector, on the part of the United States, and the Klamath and Modoc tribes and Yahooskin band of Snake Indians, belonging to the Klamath Indian Agency, in the State of Oregon, witnesseth:

ARTICLE I. The said Klamath and other Indians belonging to the Klamath Agency, Oregon, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Klamath Indian Reservation lying between the boundaries described in the treaty with said Indians concluded October fourteenth, eighteen hundred and sixty-four, and proclaims February seventeenth, eighteen hundred

and seventy, as confirmed by the Klamath boundary commission in their report to the Secretary of the Interior, dated December eighteenth, eighteen hundred and ninety-six, and the reservation boundary lines as established by the survey approved in eighteen hundred and eighty-eight by the General Land Office, the tract of land hereby ceded and relinquished comprising six hundred and twenty-one thousand eight hundred and twenty-four acres.

ARTICLE II. In consideration of the land ceded, relinquished, and conveyed by Article I of this agreement, and in full of all claims and demands of said Klamath and other Indians arising or growing out of the erroneous survey of the outboundaries of their reservation in eighteen hundred and seventy-one, the United States stipulates and agrees to pay to and expend for said Indians, in the manner hereinafter provided, the sum of five hundred and thirty-seven thousand and seven dollars and twenty cents ($537.007.20), being at the rate of eighty-six and 36/100 (.86 36/100) cents per acre, the price awarded for said lands by the Klamath boundary commissioners in their report to the Secretary of the Interior, dated December eighteenth, eighteen hundred and ninety-six.

ARTICLE III. It is agreed that of the amount to be paid to the said Klamath and other Indians, as stipulated in Article II of this agreement, the sum of twenty-five thousand dollars shall be paid in cash pro rata, share and

share alike, to each man, woman, and child belonging to said Klamath, and other tribes and under the jurisdiction of the Klamath Indian Agency, within one hundred and fifty days from and after the date of ratification of this agreement, and the sum of three hundred and fifty thousand dollars shall be deposited in the Treasury of the United States to the credit of said Indians, and shall draw interest at the rate of five per centum per annum, which interest shall be paid to said Indians annually per capita in cash, and that the remainder of said sum of five hundred and thirty-seven thousand and seven dollars and twenty cents, after the payment of the legal fees of attorneys having duly approved contracts, shall be expended for the benefit of said Indians, under the direction of the Secretary of the Interior, upon requisition of the Indians through the U.S. Indian Agent, in the drainage and irrigation of their lands, and the purchase of stock cattle for issue to said Indians, and for such other purposes of stock cattle for issue to said Indians, and for such other purposes as may, in his opinion best promote their welfare: *Provided*, That beneficiaries whose allotments will not be benefited by the irrigation systems constructed under this provision shall not bear any of the expense of such irrigation construction, and shall, as nearly as practicable, receive an equivalent in value of the stock cattle or other articles herein contemplated, that each beneficiary may thus receive his or her proportionate share of the benefits of this provision: *And*

provided further, That in addition to the interest on the fund deposited in the U.S. Treasury, the Secretary of the Interior may, in his discretion, expend for the benefit of said Indians, including reasonable cash payments per capita, not to exceed ten per centum per annum of the principal fund, upon a majority of the male adult Indians of Klamath Agency petitioning for same through the Commissioner of Indian Affairs.

ARTICLE IV. It is understood that nothing in this agreement shall be construed to deprive the said Klamath and other Indians of the Klamath Agency of any benefits to which they are entitled under existing treaties, not inconsistent with the provisions of this agreement.

ARTICLE V. This agreement shall take effect and be in force when signed by U.S. Indian Inspector James McLaughlin, and by a majority of the male adult Indians, parties thereto, and when approved by the Secretary of the Interior and accepted and ratified by the Congress of the United States.

For the purpose of carrying into effect the foregoing agreement the sum of five hundred and thirty-seven thousand and seven dollars and twenty cents is hereby appropriated out of any money in the Treasury not otherwise appropriated, and the said agreement is hereby ratified and confirmed. Of the said sum so appropriated, three hundred and fifty thousand dollars shall be deposited in the Treasury of the United States to the credit of

said Indians and the remainder shall be expended as provided in the third article of said agreement.

That the Secretary of the Interior be, and is hereby, authorized, in his discretion, to exchange the whole of the odd numbered sections and parts thereof in the Klamath Indian Reservation in the State of Oregon, now held in private ownership under the final decree and decision of the Supreme Court of the United States, affirming the title of the California and Oregon Land Company thereto, in the suit of the United States against said company as reported in volume one hundred and ninety-two, at page three hundred and fifty-five, of the decisions of said court, and aggregating one hundred and eleven thousand three hundred and eighty-five acres, for other lands not exceeding eighty-seven thousand acres, situate in one or more compact bodies, in townships thirty-one and thirty-two south, of ranges eleven, twelve, and thirteen east in said reservation, said lands so taken in exchange to be selected, subject to the approval of the Secretary of the Interior; and in order to facilitate such exchange and the development of the lands to be so taken thereunder there may also be selected in like manner and as part of the quantity aforesaid other lands in said reservation for the location, construction, and operation of mills and power plants, and with the right to construct railroads, dams, reservoirs, and power-transmission lines, subject to the provisions of existing law and such rules and regulations as the Secretary of the Interior may

prescribe thereunder. When such exchange is effected patents for the lands so selected and approved shall issue therefor.

SALEM SCHOOL

For support and education of six hundred Indian pupils at the Indian school, Salem, Oregon, one hundred thousand two hundred dollars;

For pay of superintendent at said school, two thousand dollars;

For general repairs and improvements, including construction of viaduct, five thousand dollars;

For bakery and equipment, four thousand dollars;

For general incidental expenses of the Indian Service in Oregon, including traveling expenses of agents, and support and civilization of Indians of Grande Ronde and Siletz agencies, three thousand dollars;

Pay of employees at the same agencies, three thousand dollars;

In all, six thousand dollars.